Quarterly Report

of the

ATTORNEY GENERAL

of

ALABAMA

For The Period

From April 1, 1960

Through June 30, 1960

VOLUME 99

MacDONALD GALLION, Attorney General

1961

QUARTERLY REPORT

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Volume No. 99

TO THE STATE, COUNTY, AND MUNICIPAL OFFICERS OF ALABAMA:

This Quarterly Report of the Attorney General of Alabama, which includes all official opinions rendered by the Attorney General from April 1, 1960, through June 30, 1960, is published in compliance with the provisions of Title 55, Section 228, Code of Alabama, 1940.

Under this section of the Code, I am required to send seven copies of this Quarterly Report to each judge of probate in the State and the judge of probate, in turn, is required to deliver one copy each to the clerk of the circuit court, the sheriff, the tax collector, the tax assessor, the county superintendent of education, and the deputy or county solicitor of his county. This section also requires that I send a copy of this report to each circuit solicitor and the chief executive officer of each incorporated municipality in the State

The office of the Attorney General is anxious to render prompt and efficient service to the State, county, and municipal officials. If you have any suggestions to make regarding the improvement of the service, I shall be glad to hear from you.

Sincerely,

MacDONALD GALLION,
Attorney General

MacDONALD GALLION
Attorney General

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Administrative Assistant

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George O. Miller, Jr.

Assistant Attorneys General Assigned to the Department of Conservation
John D. Bonham
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Assistant Attorney General Assigned to the Department of Pensions and Security
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Assistant Attorneys General Assigned to the Department of Revenue
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OPINIONS

April 1, 1960

Honorable James E. Putnam
Mayor, City of Phenix City
Phenix City, Alabama

Municipalities—Public Utilities—Water.

1. A municipal water works board, organized pursuant to Title 37, Section 394, Code of Alabama 1940, as amended, is authorized to furnish water, under contract, to the inhabitants of territory surrounding the corporate limits and the police jurisdiction of the municipality.

2. In the absence of some physical difference to justify a separate classification, when water is sold to persons living outside the corporate limits of a municipality, it must be furnished at the same rate as is charged the residents of the municipality.

3. A municipal water works board organized pursuant to Title 37, Section 394, Code of Alabama 1940, as amended, may require those desiring an extension of a water main to deposit the cost of such extension and refund said cost, or a part thereof, from future earnings.

Opinion by Assistant Attorney General Gish.

Dear Sir:

Your request for an official opinion, bearing date of February 24, 1960, is as follows:

"The Water Works and Gas Board of the City of Phenix City, Alabama was organized and incorporated pursuant to the provisions contained in sections 394 through 402 (14) of Articles 5 and 6 of Title 37, Code, 1940.

"Said Board was recently approached by delegation of private citizens who reside in an unincorporated area contiguous to, but outside the corporate limits of said City, with reference to obtaining City water service in their community.

"It has been proposed by said delegation of citizens and said Board that they execute a contract which shall contain the following basic terms, to-wit:

"(a) The delegation of citizens will bear the total cost of extending water service to their community. The total estimated amount necessary for the extension will be deposited with said Board before construction

commences (b) After water services and facilities have been extended to said Community, the Board will charge to all after-acquired customers a sum certain for tap-on or connection fees. Connection, or tap-on fees, and charges for water will be set at a higher rate than those being charged to customers within the corporate limits of said City. As additional customers are acquired the Board will make refunds in certain amounts per each new customer to the delegation of citizens jointly until they have been paid in full for their initial outlay.

"The Water Works and Gas Board has been advised by their attorney that the laws of this State do not clearly define its authority to extend water services beyond the corporate limits of Phenix City, and its authority to contract in the manner above outlined.

"The Board of Commissioners has authorized me by resolution duly adopted, a copy of which is hereunto attached, to obtain from you an official opinion relative to the matters above stated,

"I, therefore, submit to you, for your official opinion, the following questions:

"1. Does the Water Works and Gas Board of the City of Phenix City, Alabama, which is organized and incorporated under the provisions contained in sections 394 through 402(14) of Articles 5 and 6 Code, 1940, have the same authority to furnish water services and facilities to areas outside the corporate limits as is granted to municipalities in general under the provisions contained in sections 360 and 363 of Article 1, Title 37, Code, 1940—i.e. may said Board furnish water, under contract, to customers who reside beyond the corporate limits and police jurisdiction of said City?

"2. If your answer to the preceding question is in the affirmative, may said Board charge customers who reside outside the city limits of said City higher fees for connections, or tap-ons, and for water, than are charged to customers who reside within the city limits?

"3. If your answer to the preceding question is in the affirmative, may said Board enter into a contract with a group of private citizens who reside outside the corporate limits of said City, whereby said group of citizens agree to bear the total cost of extending water service to their area, and whereby said Board agrees to eventually refund said group of citizens in full for the expense of such extention by paying them an amount certain on every occasion that a new water customer is acquired, said payment to continue until the initial outlay of said citizens has been refunded in full?"

Your first question is controlled by Title 37, Section 398, Code of Alabama 1940, as amended by Section 3 of Act No. 686, Acts of Alabama 1949, page 1057, which prescribes the powers of municipal water works boards

organized pursuant to Title 37, Section 394, Code of Alabama 1940, as amended by Section 1 of Act No. 686, supra.

In addition to other powers Section 398, as amended supra, grants to said board the following authority.

> " . . . to sell at wholesale all or any part of its water supply to any other corporation organized under the provisions of this article or to any municipality for distribution to the inhabitants thereof and the surrounding territory; to sell water and to furnish sewer services and other services from any system operation of which is provided for in its certificate of incorporation and to establish and collect and alter charges for water, sewer services, and all services of any kind sold or furnished by it, . . ."

I am of the opinion that the language of Section 398, as amended, supra, is sufficiently broad to authorize a municipal water works board, controlled by said section, as amended, to furnish water under contract to customers who reside outside the corporate limits and the police jurisdiction of the municipality but within the territory surrounding such municipality.

See **Water Works Board of City of Mobile v. City of Mobile**, 253 Ala. 158, 43 So. 2d 409. See also **Atkinson v. City of Gadsden**, 238 Ala. 556, 192 So. 510, which was decided before Act No. 686, supra, was enacted.

Therefore, in answer to your first question you are advised that the Water Works and Gas Board of the City of Phenix City is authorized to sell water to customers who reside within the area to which your request refers. Cf. Quarterly Report of Attorney General, Vol. 48, page 65.

Charges for municipal utilities service must be reasonable to both the users of the facility and to its operators, and the charges must have relation to the benefits to the users and to a reasonable return on investment.

Water Works and Sanitary Sewer Board, et al v. Dean, 260 Ala. 221, 69 So. 2d 704.

It seems well settled in this State that, in the absence of some physical difference to justify a separate classification, when water is sold to persons living outside the corporate limits of a municipality, it must be furnished at the same rate as is charged within such limits, and a classification based wholly on the corporate line as the line of demarcation is unreasonable and constitutes unjust discrimination. **City of Montgomery v. Greene, et al**, 187 Ala. 196, 65 So. 783.

Our Supreme Court held in the case of **City of Montgomery v Greene, et al**, 180 Ala. 322, 60 So. 900, that, when a municipality extends its water mains beyond its corporate limits, it may not discriminate in favor of those who reside within the municipality, and who are liable for municipal taxes,

since the rate charged for water is not a tax but is a fee for the furnishing of a public necessity which must be supplied to all customers alike. However, the Court's opinion recognizes the fact that physical differences may warrant the charging of higher rates to some customers.

It should here be pointed out that in the case of **Birmingham Electric Company v. City of Bessemer**, 237 Ala. 240, 186 So. 569, the Court stated that, when a municipality engages in proprietary enterprises for the purpose of serving its inhabitants and also serves others outside its corporate limits, it must serve all customers at uniform rates. This statement was mere dictum since no question of the amount of rates charged was involved in the case.

Due to the lack of authorities on the problem, I cannot give you a positive answer to your second question. However, there may be physical differences existing between that territory served within the corporate limits of the City of Phenix City and that area outside said corporate limits, to which your request refers, which warrants the charging of higher water rates in the latter area. This question may be decided only by the courts.

A municipal water works board may require those desiring an extension of a water main to deposit the cost of such extension and refund said costs, or a part thereof, from future earnings. **State Ex. rel. Kennedy, et al, v. Public Service Commission (Mo.)**, 42 S. W. 2d 349.

Under the broad powers granted by Section 398, as amended, supra, I am of the opinion that your third question should be answered in the affirmative. Cf. Quarterly Report of Attorney General, Vol. 48, page 65, supra.

Very truly yours,

MacDONALD GALLION
Attorney General

May 2, 1960

Hon. H. Harrison Hill
Clerk of Circuit Court
Morgan County
Decatur, Alabama

Costs and Fees—Clerks of Circuit Courts.

1. The fees to which clerks of circuit courts are entitled in civil proceedings are set out in Title 11, Section 21, Code of Alabama 1940, as amended by Act No. 740, Acts of 1957, page

1169 and are governed in amount by the "amount in controversy" in each particular suit.

2. The "amount in controversy" in each case is finalized upon submission of such case to the court or jury and the fees of the clerk becomes established at that time.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion bearing date of April 5, 1960 is as follows:

"Referring to Title 11, Section 21, of the Code of Alabama 1940, as amended and approved September 20, 1957, as to clerk's fees you will note that certain clerk's fees are based on the amount claimed which is in part as follows:

"'. . . for filing suit where the amount in controversy does not exceed one hundred dollars, or is not otherwise provided, six dollars for filing suit where the amount in controversy is over one hundred but not exceeding one thousand dollars, and is not otherwise provided for, ten dollars; for filing suit for not less than one thousand dollars, and for all transfers or appeals to the circuit court from courts of probate, twenty dollars; . . .'

"Recently a local attorney for the plaintiff filed suits for an amount in excess of one thousand dollars. However, prior to an order of court he requested this office to figure the court costs to date, and this office included in the total amount the sum of twenty dollars as clerk's fees.

Later on he came in and filed an amendment purporting to amend the original complaint to a sum of one hundred dollars in each of two cases, and in the next moment presented them to the Court and one case was dismissed on motion of the plaintiff at the cost of the plaintiff and in the other recovered a judgment by agreement in favor of the plaintiff for the sum of one dollar and costs.

"The said attorney contended that by said amendments that the clerk's fees should have been for the sum of six dollars in each case, and this office contended that if that be the case then every attorney at the bar could come in and amend their complaints and change said clerk's fees at their whim, so I refused to accept the said complaints as amended on the spur of the moment so as to change said clerk's fees after he had already asked this office how much the costs would be.

"The question is am I as clerk entitled to the said twenty dollars as fees due to the amount being in excess of one thousand dollars originally or do I have to accept the lesser sum due to the attorney amending the said complaint on the spur of the moment so as to reduce the said costs at his pleasure?

"Also please give this office a ruling on what the clerk's fees should be if a case is originally filed for the sum of one hundred dollars and later amended to a sum in excess of one thousand dollars.

"This office would appreciate a ruling as soon as possible as this question could and will be, I am sure, coming up again in the near future."

The answer to your inquiry is dependent upon a proper interpretation of that portion of Title 11, Section 21, Code of Alabama 1940, as last amended by Act No. 740, Acts of 1957, page 1169, which is set out by you in your request for an opinion.

It is to be noted that this portion of such amended statute provides a fixed fee for the services of the clerk, which is governed in amount by the "amount in controversy" in the particular suit. Such statute provides fees as follows:

" . . . for filing suit where the amount in controversy does not exceed one hundred dollars, or is not otherwise provided, six dollars for filing suit where the amount in controversy is over one hundred dollars but not exceeding one thousand dollars, and is not otherwise provided for, ten dollars; for filing suit for not less than one thousand dollars, and for all transfers or appeals to the circuit court from courts of probate, twenty dollars; . . . "

You present a situation wherein, after filing, the attorney for the plaintiff wishes to amend his complaint as to the amount sought therein. We must determine whether or not this would change the "amount in controversy" so as to affect the fees of the clerk. In so determining, we must consider the nature of the fees provided for the clerk by this particular statute.

Title 11, Section 21, as amended supra, was one of a series of acts passed by the Legislature of 1957 relating to the fees of the clerks of the circuit courts, changing the method of compensation of these clerks from a system of specific fees to that of a system of set fees for all services rendered in particular type cases. This statute, Section 21, supra, relates to the fees of the clerk in civil matters. It is my judgment and understanding of these "set" fees that they constitute the total fees of the clerk in the case to which they apply.

Based upon this premise, I would conclude that the amount provided for in the above quoted portion of Section 21, supra, has application to all

of the services of the clerk rendered in any particular case, and not merely to his act of "filing" the suit in question. If this be true, we must determine at what point the "amount in controversy" becomes fixed so as to establish the fee to which the clerk is entitled. In my opinion, the "amount in controversy," is that amount claimed at the time such case is submitted to the court or jury for its determination and is not necessarily the amount set out in the original complaint. To hold otherwise could work an injustice both to the clerk of the court as well as to lawyers practicing before such court.

In my opinion, a complaint may be filed and subsequently amended, either through increase or decrease of the amount claimed, and such amount does not become "in controversy" until same is submitted to the court or jury for its determination. At the moment such complaint is submitted to the court or jury, I feel that the "amount in controversy" is then fixed and the fees of the clerk should be based upon the amount so established.

To conclude, I would advise that suits filed in your court seeking any given amount may be amended, either by increase or decrease of the amount sought, at any time prior to submission to the court or jury without in anywise affecting the fees to which you are entitled. At the time such complaint is submitted to the court or jury, the "amount in controversy" becomes fixed, and you should determine your fees based upon the amount then sought by such suit. If the amount sought has been increased to a greater amount, your fees would be accordingly increased. If the amount sought has been reduced to a lesser amount then, by all equitable principles, your fees should be accordingly reduced.

Very truly yours,

MacDONALD GALLION

May 11, 1960

Honorable William C. Younger
Director of Conservation
State of Alabama
Montgomery 4, Alabama

Conservation, Department of—Licenses—Refunds

The Department of Conservation is not authorized to refund the purchase price of erroneously purchased boat licenses.

Opinion by Assistant Attorney General Bonham.

Dear Sir:

Your request for an official opinion bearing date of May 4, 1960, is as follows:

"Your attention is directed to the new Water Safety Act (Act No. 576, 1959, General Acts of Alabama), which provides for the licensing of mechanically propelled, livery, and sail boats used on the waters of this State. The license fees are based on the length of the boat at a graduated scale.

"From time to time the owners of vessels erroneously register for various reasons boats which are not required to be registered. These people then make requests to the Department of Conservation for refunds for the license so purchased.

"Your official opinion is requested as to whether or not there is any provision under Alabama law wherein the Department of Conservation can refund the purchase price of such erroneously purchased licenses.

If your answer to this question is in the affirmative, I would also appreciate your opinion as to whether or not the refund monies would also include the issuance fee of the probate judge or license commissioner and what procedure should be taken by the Department of Conservation to refund such issuance fees."

The provisions of the Water Safety Act, supra, are silent as to the refund of amounts erroneously paid for boat licenses.

There are several statutes in this State pertaining to refunds on amounts erroneously paid as taxes or for business licenses, as follows:

Code of Alabama 1940 — —

1. Title 51, Section 328, relating to refunds on property taxes.

2. Title 51, Section 332, relating to refunds on municipal taxes, etc.

3. Title 51, Sections 848 and 849, as amended, relating to refunds on business licenses.

4. Title 51, Section 913, as amended, relating to refunds on business licenses and taxes paid directly to department of revenue.

However, after a careful consideration of these statutes, I am of the opinion that they cannot be in any way construed so as to authorize the Department of Conservation to refund the purchase price of boat tags erroneously purchased under the provisions of the Water Safety Act, supra.

The answer to your first question being in the negative makes an answer to your second question unnecessary.

Very truly yours,

MacDONALD GALLION
Attorney General

May 12, 1960

Honorable John R. Sparks
Circuit Clerk
Cullman County
Cullman, Alabama

County Courts—Clerks of County Courts—Clerks of Circuit Courts—Final Record Opinions Overruled, Modified or Distinguished.

The Clerk of the Circuit Court as Ex-Officio Clerk of the County Court is required to make a final record of cases in the County Court.

Opinion by Assistant Attorney General Coe.

Dear Sir:

Your request for an official opinion is as follows:

"There is some information relative to County Court Final Record that I really would like to have. At your convenience, please furnish me the following:

"**QUESTION**—In my capacity as Ex-Officio Clerk of the County Court, is it mandatory that I make a final record of the County Court Affidavits, Warrants, Bonds, and the Court's entry on the docket sheets? We have always done this here; however, the Attorney General's Report, Vol. 33, Page 48, indicates to me that this may not be a court of record and that the above might not be mandatory.

"In this county the Judge of Probate serves as Ex-Officio Judge of County Court."

Title 13, Section 316, Code of Alabama 1940, is as follows:

"Fees of clerks.—The fees and compensation of said clerks for their duties as clerks of the county court shall be the same as now allowed by law to the clerks of the circuit court in criminal cases, and shall be paid in like manner."

In construing the above section, the Supreme Court in **Swindle v. Crocker**, 217 Ala. 199, 115 So. 252, held:

" . . . it will be observed that there is no express specific command that clerks of the circuit court acting in their ex-officio capacity as clerks of the county court shall make final records, but that is the necessary implication, for clerks of the circuit court are required to make final records and a necessary implication serves every purpose of an express command. . . . "

In view of the above excerpt, I am of the opinion, and you are so advised, that it is mandatory that the ex-officio clerk of the county court make a final record for which he is entitled to the same fees and compensation allowed by law to the clerks of the circuit court. However, in the counties such as Cullman where the Clerk of the Circuit Court is paid a salary by virtue of a local enactment, the fees are paid into the county treasury. See opinion of this office rendered to Honorable John R. Sparks, Clerk of the Circuit Court, Cullman County, under date of June 1, 1959 (Ms.).

An opinion of this office found in Biennial Report of the Attorney General 1922-1924, page 92 is hereby expressly overruled.

Very truly yours,

MacDONALD GALLION
Attorney General

May 17, 1960

Honorable Hoyt B. Hamilton
Judge of Probate
St. Clair County
Pell City, Alabama

Mortgages—Probate Courts—Records—Opinions Overruled, Modified or Distinguished

1. It is not necessary to have the attestation of the probate judge or his clerk, to mortgages satisfied by power of attorney or release.

2. It is necessary to have the attestation where satisfaction is

made without written demand, by the individual mortgagee.

Opinion by Assistant Attorney General Tyson.

Dear Sir:

Your request for an official opinion, under date of May 5, 1960, is as follows:

"A matter which may effect title to many parcels of land has been brought to my attention, and I respectfully request your opinion as to the proper construction or interpretation of the laws of the State of Alabama relating thereto.

"Section 178, Title 47, Code of 1940, provides that upon payment or satisfaction of a mortgage or deed of trust which has been placed of record, and upon demand in writing by the mortgagor or certain other parties having an interest in the land, the mortgagee, assignee of the mortgage, etc., must enter satisfaction of the fact of payment on the margin of the record of the mortgage or deed of trust. It further provides that such entry of satisfaction or payment must be witnessed by the Judge of Probate or his clerk, who, in his official capacity, must attest said satisfaction. In addition, this section provides as follows:

'Or satisfaction may be made by an attorney in fact authorized by an instrument executed and acknowledged as is required of conveyances and filed for record, which entry need not be attested . . . '

"Several questions have arisen in connection with such marginal notations of payment or satisfaction and I respectfully request your opinion as to the following:

"1. Under the above provisions and/or any applicable statute, is it necessary that marginal notations of payment or satisfaction where there has been no written demand or request be witnessed by the Judge of Probate or his clerk and attested by that official in his official capacity?

"2. Will such entry made without being witnessed by the Judge of Probate or his clerk or attested by one of them be effective to release such mortgage or deed of trust from the lien effect therof, and bar all suits thereon at law or in equity?

"3. Under Section 178, may an attorney in fact, duly authorized by the mortgagee, etc., by an instrument properly executed and filed for record, effectively note the payment or satisfaction of such mortgage debt

without having such notation or satisfaction witnessed and attested by the Judge of Probate of his clerk?

"4. Since Section 178 was brought over from the Code of 1907 to the Code of 1923 and from that code to the Code of 1940, and the office of the Attorney General subsequent to the adoption of the Code of 1923 and prior to the adoption of the Code of 1940, (Reports of the Attorney General, 1928-30, page 810), issued an opinion holding that an attorney in fact can occupy no higher ground than his principal, hence required witnessing of such satisfaction by an attorney in fact, is that opinion applicable to said Section as re-incorporated in the Code of 1940?"

Title 47, Section 178, Code of Alabama 1940, reads as follows:

"§ 178. FULL PAYMENT OR SATISFACTION OF MORTGAGE DEBT ENTERED.—If a mortgage or deed of trust which is of record has been fully paid or satisfied, the mortgagee or transferee or assignee of the mortgage, or trustee or cestui que trust of the deed of trust, who has received payment or satisfaction, must on request in writing of the mortgagor, or of a creditor of the mortgagor having a lien or claim on the property mortgaged, or of a purchaser from the mortgagor, or owner of the lands mortgaged, or a junior mortgagee, or of the debtor in a deed of trust, enter the fact of payment or satisfaction on the margin of the record of the mortgage or deed of trust. Such entry must be witnessed by the judge of probate, or his clerk, who, in his official caapcity, must attest said satisfaction, and for making such attestation the judge of probate is entitled to a fee of twenty-five cents. Or satisfaction may be made by an attorney in fact authorized by an instrument executed and acknowledged as is required of conveyances and filed for record, which entry need not be attested. Such entry operates as a release of the mortgage or deed of trust, and is a bar to all suits thereon at law or in equity."

This is a penal statute and must be strictly construed. **Scales v. Rosenbush**, 212 Ala. 19, 101 So. 743.

The questions asked will be answered in inverse order. Questions 3 and 4 raise substantially the same point, viz., is it necessary where satisfaction of a mortgage is made through power of attorney or release, to have same attested by the probate judge or his clerk?

The answer to this is in the negative, as the Section in question expressly authorizes satisfaction of a mortgage by power of attorney, properly executed and acknowledged, or by release (Title 47, Section 22, Code of Alabama 1940), hence, the former opinions of this office (Biennial Report of Attorney General, 1928-30, page 810, Biennial Report of Attorney General, 1922-24, page 440; and Biennial Report of Attorney General, 1936-38, page 107), construing Section 9023, of the Code of Alabama 1923, which

did not have such a provision, are no longer applicable in view of the change in the statute in question.

This brings us then to the question of satisfaction of a mortgage by the individual mortgagee, as to whether it is necessary, without demand in writing for satisfaction, to have such satisfaction attested by the probate judge or his clerk.

While written demand upon the mortgagee is necessary in order to sustain an action to enforce the penalty, **Burns v. Burns**, 228 Ala. 61, 152 So. 48, such written demand is not controlling in order to have a valid satisfaction. To hold otherwise would be to open the door to fraudulent cancellations. Lewis v. Cannon, 216 Ala. 515, 113 So. 577; and Biennial Report of Attorney General, 1928-30, page 811.

In brief then, such written demand is not controlling on the question of proper attestation, but rather it is the lending of verity to the mortgagee's signature that is controlling. Hence, it is absolutely necessary to have attestation by the probate judge or his clerk where such satisfaction is made by the individual mortgagee in order to have a valid satisfaction.

While under **Burns v. Burns**, supra; and also **Greer v. Gullette**, 234 Ala. 79, 173 So. 505, a defective satisfaction may raise a rebuttable presumption of payment, the answer to question two would depend upon the facts and circumstances of each case as arising thereunder, therefore, the same would properly be a matter for judicial determination.

Very truly yours,

MacDONALD GALLION
Attorney General

May 19, 1960

Hon. Leo Roberson
County Solicitor
Lawrence County
Moulton, Alabama

Costs and Fees—Sheriffs—Comptroller

1. The Comptroller may pay from state funds only those items of cost enumerated in Title 45, Section 69, Code of Alabama 1940, as amended by Act No. 542, Acts of 1957, page 762, which do not include the fee of $1.00 accruing to the sheriff for fingerprinting each person taken into custody by him.

2. The sheriff is entitled to the fee of $1.00 for fingerprinting each person taken into custody by him whether such person be charged with a felony or a misdemeanor, if such apprehension results in a criminal prosecution.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion bearing date of May 13, 1960, is as follows:

"Re: Fees for Sheriffs For Fingerprinting.

"Chapter 3, Title 54, Sections 38-42, inclusive, provides for the fingerprinting of persons taken into custody by the sheriff of each county. Act No. 571, Sec. 2, 1955 Legislature, (further amending Title 11, Section 100, Code of Alabama) allowed each sheriff so fingerprinting persons taken into custody by said sheriffs, allows a fee for such fingerprinting of $1.00.

"As County Solicitor of Lawrence County, Alabama, I have been requested to ask you to advise the Comptroller that such a fee is an item of the costs, to be paid in the State Cost Bills, submitted for payment of fees and costs for payment by the State of Alabama.

"My information is that the Comptroller's statement is: that he has never paid this as an item of cost and is not going to do so until he is told that such is an includable item of costs.

"Thus, is not the item of $1.00, an item that can be included on cost bills submitted by the Clerk of the Courts, to the State, for payment as other fees and costs are paid?

"Does the Sheriff receive these fees for such fingerprinting both in felony cases and misdemeanor cases?"

In reply to your inquiry I must advise that, in my opinion, the item of cost mentioned by you is not one which is payable from state funds. In my judgment, the State Comptroller is correct in refusing to make payment of such item from funds of the State of Alabama.

For an item of cost in a criminal case to be payable by the state, same must be included within those items enumerated in Title 45, Section 69, Code of Alabama 1940, as last amended by Act No. 542, Acts of 1957, page 762.

Reference to this amended statute does not indicate that the item of cost relating to the fee of the sheriff for fingerprinting persons taken into custody by him is there included. In view of these circumstances there would be no authority for the Comptroller to make payment of this item of cost from state funds.

Regarding your second inquiry as to the right of the sheriff to receive this fee in both felony and misdemeanor cases, I would advise that such officer would be entitled to the fee allowed him by Title 11, Section 100, Code of Alabama 1940, as amended by Act No. 571, Acts of 1955, page 1243, this fee now being in the amount of $1.00. In my judgment, the right of the sheriff to receive such fee is based upon the sheriff taking such person into "custody" and not upon the nature of the offense with which the person apprehended is charged. If a person be taken into custody by the sheriff it becomes his duty, under Act No. 420, Acts of 1943, page 385 to fingerprint such person and to make distribution of the prints so taken in accordance with the terms of this act. As noted, his right to the fee allowed is not contingent upon whether the offense be a misdemeanor or a felony.

I should perhaps further call your attention to the fact that such fee is to be taxed only in "criminal prosecutions." Should the sheriff take into custody a person who is subsequently released without charge or through failure of the grand jury to indict him, the fee allowed for fingerprinting could not be taxed as cost in the case, as no "criminal prosecution" ever existed. This is mentioned to acquaint the clerk with the fact that such fee is only to be taxed as cost in those instances where a criminal prosecution results from the taking into custody of the person so fingerprinted.

See official opinion (Pike County) rendered to Hon. Robert Newman, President, Alabama Association of Circuit Court Clerks and Registers, under date of May 5, 1959.

Very truly yours,

MacDONALD GALLION
Attorney General

June 7, 1960

Honorable C. W. Carpenter, Superintendent
Crenshaw County Public Schools
Luverne, Alabama

Schools—Teachers—Employment, Employers and Employees—County Boards of Education—County Superintendents of Education.

1. All principals, teachers and other regular employees of the County Boards of Education are employed on the written recommendation of the County Superintendent of Education by the said Boards of Education and such employment is the joint action of the Superintendent and the Board.

2. Dismissals may be recommended by the County Superintendents of Education as to principals, teachers and all other regular employees of County Boards of Education, but because of Title 52, Section 86, Code of Alabama 1940, they must be dismissed only by said Boards on the grounds set forth therein.

Opinion by Assistant Attorney General Madison.

Dear Sir:

Your request for an official opinion bearing date of May 27, 1960, is as follows:

"Please give me your official opinion on the following questions concerning the duties of the County Superintendent of Education in our county:

"In employing or dismissing teachers, is it necessary first for the County Superintendent to recommend to his Board of Education the employment or dismissal of a teacher with them concurring before employment or dismissal can be secured?

"Can the County Board of Education legally employ or dismiss an employee without the recommendation of their Superintendent?

"If it is true that the County Superintendent must first recommend the employment or dismissal of a teacher, is it not true that if the County Board of Education does not concur with him, that he is supposed to continue to recommend until they do"?

In answer to your first question, I beg to advise that the intimate official relations between the County Board of Education and the County Superintendent of Education are fully set forth in the case of **Shores v. Elmore County Board of Education**, 241 Ala. 464, 3 So. 2d 14.

That opinion points out that under Sections 86 and 123, Title 52, Code of Alabama 1940, all principals, teachers, and other regular employees of the Board are to be appointed by the Board on the written recommendation of the Superintendent. This requires joint action as pointed out in **Roberts v. State**, 228 Ala. 222, 153 So. 432. Quarterly Report of Attorney General, Volume 88, page 14.

Dismissals may be recommended by the Superintendent as to principals, teachers, and all other regular employees of the Board. Title 52, Section 123; Code of Alabama 1940. Because of Section 86, Title 52, Code of Alabama 1940, I am of the opinion, however, that the Board of Education may dismiss for immorality, misconduct in office, insubordination, or incompetency, or wilful neglect of duty, or whenever, in the opinion of the Board, the best interests of the school require it, a teacher or any other employees or appointees of the Board subject to the provisions of the Tenure Law; this whether the recommendation is made by the Superintendent or not. Quarterly Report of Attorney General, Volume 64, page 33.

The above also answers your second question and your third is answered in the negative.

Yours very truly,

MacDONALD GALLION
Attorney General

June 7, 1960

Honorable C. W. Carpenter, Superintendent
Crenshaw County Public Schools
Luverne, Alabama

Schools—Teachers—County Boards of Education—County Superintendents of Education.

1. A teacher, other than one holding a provisional certificate, is deemed by law to be re-employed for the next ensuing year unless notice to the contrary is given as provided by Act No. 773, General and Local Acts 1953, page 1040.

2. The question of re-employment of a teacher is to be determined by the employing Board of Education.

3. The County Superintendent of Education acts only as the voice of the County Board of Education in giving the notice required by Act No. 773, General and Local Acts 1953, page 1040.

Opinion by Assistant Attorney General Madison.

Dear Sir:

Your request for an official opinion bearing date of May 27, 1960, is as follows:

"I desire your official opinion on the following questions concerning the operation of our schools in our county:

"Where a teacher without tenure status was employed the past year to teach in our county and so taught, is it necessary for such teacher to be again employed for the ensuing year before she or he will be lawfully employed as a teacher for said ensuing year, and if so then, is it necessary for said teacher to have the recommendation of the County Superintendent of Education and concurrence by the County Board of Education before she or he is legally employed? Should the County Superintendent not see fit to recommend said teacher, can the County Board of Education in absence of such recommendation employ said teacher? If said teacher is not required to be re-employed for the ensuing year before being eligible to teach, then can the County Superintendent without the approval of the said County Board of Education dismiss said teacher before tenure status is acquired by said teacher, if not who can dismiss said teacher? If this teacher teaches in City School, would this have any bearing on the questions? Who would sign the teachers contract, the County Superintendent, Board of Education, or both"?

Act No. 773, General and Local Acts 1953, page 1040, in Section 361 (b) thereof provides the following:

"Teacher deemed re-employed for succeeding school year unless notified.—Any teacher in the public schools, whether in continuing service status or not, shall be deemed offered re-employment for the succeeding school year at the same salary, unless the employing board of education shall cause notice in writing to be given said teacher on or before the last day of the term of the school in which the teacher is employed; and such teacher shall be presumed to have accepted such employment unless he, or she, shall notify the employing board of education in writing to the contrary on or before the fifteenth day of June. The employing board of education shall not cancel the contract of any teacher in continuing service status, nor cause notice of non-employment to be given to any teacher whether in continuing service status or not except by a vote of majority of its members evidenced by the minute entries of said board made prior to or at the time of any such action."

It is to be noted that a teacher shall be deemed re-employed for the succeeding school year at the same salary unless the notice required by said Section 361(b) is given in writing by the employing Board of Education on or before the last day of the term of school in which the teacher is employed.

The above Section does not apply to a teacher employed under a provisional certificate to teach during an emergency. **Steele v. Matthews,** 253 Ala. 255, 44 So 2d 1.

As to the others, it is applicable and must be followed, and the question

of re-employment is to be determined by the "employing board." **Board of Education of Marshall County v. Baugh**, 240 Ala. 391, 199 So. 822.

The teacher has the right to expect that the matter of reemployment be determined upon the judgment of the County Board as expressed in its written memorials and at a meeting where the Board acts as a Board and not as individuals. **Board of Education of Marshall County v. Baugh**, supra. Such may not be delegated to the County Superintendent, and he acts only as the voice of the Board in giving the required notice. **Brown v. Board of Education of Blount County**, 242 Ala. 154, 5 So. 2d 629.

A notice given by the Superintendent without prior action by the Board cannot be subsequently ratified by the Board. **Board of Education of Marshall County v. Baugh**, supra.

So in answer to your first and second questions, unless the notice is given by the Board as provided above, the teacher is deemed re-employed by law without the recommendation of anyone. None is required.

In answer to your question three, it is my opinion that a teacher not on continuing service status is not required to be re-employed for the ensuing year but is so re-employed by law unless the notice is given as provided in said Section 361 (b). In any event, the County Superintendent cannot terminate a teacher's contract or dismiss one without the prior approval of the County Board. Title 52, Section 123, Code of Alabama 1940, provides that he recommend them for dismissal to the employing board.

Your fourth question is answered in the negative.

In answer to your fifth and last question, the County Board of Education is the employing Board and executes the contract. The County Superintendent does not sign such a contract under the applicable law, and, indeed, it seems to me, would not care to bind himself to pay teachers by signing the contract.

Yours very truly,

MacDONALD GALLION
Attorney General

June 7, 1960

Honorable W. M. Cousins, Jr.
Judge of Probate
Elmore County Commissioners' Court
Wetumpka, Alabama

Counties—Highways and Highway Department—Roads and Bridges.

1. The county governing body has authority to pave in front of the private property of individuals along roads or highways, but the authority is predicated upon there being no present need for the use of the personnel or equipment for public county purposes and upon the further fact that the county be justly compensated for the services rendered and materials furnished.

2. Where the county owns the right-of-way, it may pave at its expense the unpaved portion thereof in front of the property of an individual and between said property and the paved part of the regular highway made necessary for the convenience and safety of the public because of paving in front of and on the individual's property. The property owner may be required to pay if such is a part of his agreement with the county for paving in front of his property under the conditions stipulated in 1 above.

Opinion by Assistant Attorney General Madison.

Dear Sir:

Your request for an official opinion bearing date of May 30, 1960, is as follows:

"There exists conditions which make practical paving of a portion of existing rights-of-way and paving extending on to the property of private individuals in front of business establishments and public places for the protection of the existing road way and the safety of the public both on county roads and state highways in Elmore County.

"1. Where the individual requests such paving to be performed by the county on private property does the county have the right to perform such services when the property owner agrees to pay reasonable compensation for such services?

"2. When the individual requests such services and agrees to pay reasonable compensation therefor where a portion of said paving is on the right-of-way owned by said county and a portion of the paving

is on the property of the individual, would the property owner be liable for the cost of such paving that is placed along said right-of-way?

"3. When the county owns the right-of-way of a State Highway, is the county authorized to perform such work in same manner as if such road were a county road?

"4. When such paving is done along a state highway where the county is the owner of said right-of-way and said paving is done at the request of the property owner, would the property owner be liable for reasonable compensation to the county for such paving that is laid along and on said right-of-way?

"I will appreciate your usual prompt attention to this request."

This office has drawn a sharp distinction between work performed and labor and materials furnished for private roads, driveways, etc., where such is without cost to the property owner and those cases where the reasonable cost is paid by the property owner. The previous rulings of this office may be stated to be that the authority of the county governing body to do or perform work or to rent or lease equipment of the county for private work is predicated upon there being no present need for the use of such personnel or equipment for public county purposes and upon the further fact that the county be justly compensated for the services rendered. These are matters to be determined in a reasonable manner by the county governing body.

It is my opinion therefore, if the above conditions exist, and based upon the facts stated, that your first and third questions should be answered in the affirmative. The following support these positions: Quarterly Report of Attorney General, Volume 11, page 35; Volume 64, page 39; Biennial Report of Attorney General, 1928-30, page 586; Letters to T. C. Walker, Chairman, Revenue and Control, Columbiana, Alabama, under date April 20, 1956; Bernard A. Reynolds, Judge of Probate, Dallas County, under date September 16, 1957; J. W. Suddath, Clerk, Board of Revenue, Montgomery County, Alabama, under date June 18, 1958; J. D. Main, Judge of Probate, Bullock County, under date February 12, 1959; James T. Beeland, Judge of Probate, Butler County, under date March 2, 1960; Title 23, Section 43, Code of Alabama 1940, as amended by Act No. 729, General and Local Acts 1953, page 984; see also Quarterly Report of Attorney General, Volume 14, page 107.

It is my opinion that your second and fourth questions should be answered as follows: If the paving that is laid along and on the right-of-way and not on the owner's property is made necessary for the convenience and safety of the travelling public because of the work performed on the owner's property, it may be done on the right-of-way at the county's expense

or at the expense of the owner if such is part of the agreement between them.

While the property owner is required to pay a reasonable amount for the work and labor, etc., performed and furnished for him on his own property, he may or may not be required to pay for that part relating to the county's right-of-way, depending on the agreement between them or the lack of the necessity therefore for the convenience and safety of the travelling public.

Yours very truly,

MacDONALD GALLION
Attorney General

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